Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

TRAVIS RIPPY, by next friend Aaron and Janet Rippy; AARON RIPPY, and JANET RIPPY,

Petitioners,

v.

GEORGE HATTAWAY, individually and in his official capacity as Commissioner, Tennessee Department of Children's Services; ANNE MARIE BRYANT, individually and in her official capacity as social counselor of the Tennessee Department of Children's Services; and SHIRLEY BARTLETT, individually and in her official capacity as field supervisor of the Tennessee Department of Children's Services,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit erred in holding, contrary to the majority of the circuits, that social workers employed by a state foster care agency enjoy absolute immunity from liability under 42 U.S.C. § 1983 for their investigatory and administrative actions.

PARTIES TO THE PROCEEDINGS

Petitioners

Travis Rippy, by next friend Aaron and Janet Rippy; Aaron Rippy; and Janet Rippy

Respondents

George Hattaway; Anne Marie Bryant; and Shirley Bartlett

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Trauger, D.J.) denying respondents' motion to dismiss (Appendix ("App.") 25a) is an unpublished opinion. The court of appeals' opinion (per Beckwith, J., joined by Gilman, J.; dissenting opinion by Boggs, J.) reversing the district court's order (App. 1a) is published at 270 F.3d 416. The court of appeals' order denying rehearing and rehearing en banc (App. 48a) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on November 2, 2001, and denied rehearing and rehearing en banc on January 8, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provision of the Civil Rights Act of 1964, 42 U.S.C. § 1983, *et seq.*, relevant to this petition is as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

A. Factual Background

This case arises out of the eighteen-month detention of Travis Rippy, age two years, by the Tennessee Department of Children's Services *despite the lack of any evidence of any abuse or neglect directed against Travis*. Travis was removed from his parents under an order for investigation of sexual abuse initiated by the defendants in this case. At the time of his removal, social workers had not previously observed Travis, and no one had made any allegation that he had been abused. After the removal, social workers repeatedly noted in Travis' records that they were continuing *to try to determine whether he had been abused.*

Because the parents, Aaron and Janet Rippy, were residing in Kentucky, the Kentucky child services agency investigated their home, and thereafter recommended that Travis be returned to them. The defendant social workers, Anne Marie Bryant and Shirley Bartlett (both of whom worked for the Tennessee Department of Children's Services), refused to return Travis to his parents. Ms. Bryant and Ms. Bartlett insisted that Mr. and Mrs. Rippy attend sexual perpetrators' counseling, despite the lack of evidence the Rippys had abused Travis or that Travis in fact had been abused. The only counseling programs approved by the social workers included as a component a requirement that participants admit that they are sexual perpetrators. The Rippys refused to enroll in such programs. They were not sexual

perpetrators, and any statement to that effect even for the purpose of having Travis returned, would potentially expose them to criminal liability.

Travis Rippy was finally returned to his parents pursuant to a writ of habeas corpus issued by the Fourth Circuit Court of Davidson County, Tennessee. In the order granting the writ, the state circuit court specifically found that Aaron and Janet Rippy's constitutional right to due process of law had been violated.

B. The Proceedings Below

Aaron and Janet Rippy, along with their minor child, Travis Rippy, filed a complaint in the United States District Court for the Middle District of Tennessee against Defendants George Hattaway (the Commissioner of the Tennessee Department of Children's Services), Anne Marie Bryant, and Shirley Bartlett, alleging a violation of 42 U.S.C. § 1983 as it applies to the fundamental right to the care and custody of one's children. The district court exercised jurisdiction pursuant to 28 U.S.C. §§ 1343(a)(3) and 1367. Defendants moved to dismiss the case on September 25, 1998. Plaintiffs opposed that motion and thereafter, on October 30, 1998, filed an Amended Complaint. Defendants moved to dismiss the Amended Complaint under Fed. R.12(b)(6) on several grounds.

The district court granted the motion to dismiss the Section 1983 complaint insofar as the complaint related to filing of the petition to remove Travis from his parents' custody and executing the juvenile court order authorizing the removal. The district court denied the motion as to the claims in the complaint related to the defendants' failure to investigate and determine the risk of sexual abuse to Travis both before filing the petition and thereafter, and the failure to properly act based on that risk. Defendants appealed the

district court's denial of absolute and qualified immunity. The Sixth Circuit Court of Appeals reversed the district court, holding that the social workers enjoyed absolute immunity for the actions in preparing the plan of care for the child and in failing to return the child to his parents' custody. The court of appeals found that the social workers' actions were blanketed by absolute immunity because those actions were ultimately subjected to scrutiny and either approval or rejection by the juvenile court judge. The court of appeals also held that the amended complaint did not make sufficient allegations as to the specific policies, procedures, and practices promulgated by the commissioner of the Tennessee Department of Children's Services to overcome the qualified immunity he enjoyed.

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the court of appeals for at least two reasons. First, the decision of the Sixth Circuit puts it nearly alone among the circuit courts on the issue as to whether social workers enjoy absolute immunity for their investigatory and administrative actions. This question is critical to all children in foster care or subject to investigation by state-sponsored foster care agencies. The lack of uniformity among the circuit courts on this issue should be addressed by this Court.

Second, the Sixth Circuit opinion in this case directly conflicts with immunity principals announced and followed by this Court in *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991) and with the Sixth Circuit's own jurisprudence.

I. There Is A Conflict Among the Circuits Concerning Whether Social Workers Enjoy Absolute Immunity For Their Investigatory and Administrative Actions.

To date, this Court has not addressed the issue of whether social workers enjoy absolute immunity for any of their actions. Accordingly, the lower courts have relied primarily on *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991), and *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), both of which instruct courts to take a functional approach in determining whether a state actor enjoys absolute immunity for his or her actions. *Burns* held that *prosecutors* do not enjoy absolute immunity for the act of giving legal advice to the police as to whether a suspect should be hypnotized and as to whether probable cause existed for an arrest. *Burns*, 500 U.S. at 489-90; 111 S.Ct. at 1941-1942. *Buckley* held that *prosecutors* do not enjoy absolute immunity when performing administrative or investigative acts not undertaken in preparation for judicial proceedings. *Buckley*, 509 U.S. at 270, 113 S.Ct. at 2614.

Most of the circuit courts which have decided whether social workers are absolutely immune under 42 U.S.C. § 1983 for investigatory and administrative actions have applied *Burns* and its progeny to find that social workers do not have absolute immunity for their actions. The overwhelming majority of the circuits (Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C.) have concluded that absolute immunity is not available to social workers except when they are serving as advocates in a court proceeding or when drafting a petition to remove a child from his or her parents' custody. *See, e.g., Wilkinson v. Russell,* 183 F.3d 89, 98 (2d Cir. 1998) (social worker's communication to another state's social worker at direction of court for purpose of uncovering "what's going on" is so attenuated that absolute immunity is not necessary to protect

smooth operation of judicial process); *Hill v. City of New* York, 45 F.3d 653, 661 (2nd Cir. 1995) (absolute immunity is not available for the investigation of charges of child abuse and the removal of a child from its parents' custody); *Miller v. City of Philadelphia*, 174 F.3d 368, 376 fn. 6 (3rd Cir. 1999) (absolute immunity does not extend to investigative or administrative acts, that is, those which occur during the investigative phase of the child custody proceeding) *distinguishing Ernst v. Child and Youth* Services, 108 F.3d 486 (3rd Cir. 1997); *Vosberg v. Dept. of Social Services*, 884 F.2d 133, 135, fn. 2, 138 (4th Cir. 1989) (social workers are not absolutely immune from liability arising from conduct in investigating whether a removal petition should be filed; specifically reserving the question of absolute immunity for conduct in caring for a child following removal from the parent's custody); *Hodoroski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988) (absolute immunity is not available for all phases of the investigation of child abuse complaints where such immunity is not essential to the proper function of child protective service workers); *Holloway v. Brush*, 222 F.3d 767 (6th Cir. 2000) (out-of court actions of a caseworker in preparing and maintaining a case plan for a child in state custody are not entitled to absolute immunity); *C.A. Brokaw v. Mercer County, et al.*, 235 F.3d 1000 (7th Cir. 2000) (social workers responsible for detaining child in state custody in violation of constitutional right to familial relations are not entitled to absolute immunity); *Whisman v. Rinehart*, 119 F.3d 1303, 1308 (8th Cir. 1997) (where social workers' "actions did not aid in the presentation of a case to the juvenile court" but rather "were intentionally designed to avoid or unreasonably delay judicial process" to thereby detain the child without sufficient investigation," absolute immunity not available); *Snell v. Tunnell*, 920 F.2d 673, 690-91 (10th Cir. 1990) (social workers are not entitled to absolute immunity for investigation which attempts "to create a factual basis to justify intervention and confirm allegations predominantly, if not wholly, the product of speculation and conjecture"); *Gray v. Poole*,

275 F.3d 1113, 1117 (D.C.Cir. 2002) ("a social worker who functions as investigator and advisor has no legitimate basis upon which to claim absolute immunity in actions brought with respect to these functions").

Only the Ninth Circuit has adopted a rule of absolute immunity for child and dependency proceedings from origination until conclusion. *Babcock v. Tyler*, 884 F.2d 497, 503 (9th Cir. 1989) *cert den.* 493 U.S. 1072, 110 S.Ct. 1118, 107 L.Ed.2d 1025 (1989) (social workers "enjoy absolute, quasi-judicial immunity when making post adjudication custody decisions pursuant to a valid court order"). At least one other circuit has ruled that investigative functions in certain factual scenarios are protected by absolute immunity. Specifically, the Third Circuit in *Ernst v. Child and Youth Services*, 108 F.3d 486 (3rd Cir. 1997), held that social workers' actions in connection with "the formulation and presentation of recommendations to the court in the course of [dependency] proceedings" are entitled to absolute immunity. *Id.* at 495. In that same opinion, however, the Third Circuit carefully noted that the holding did not extend to "'investigative or administrative' actions taken by child welfare workers outside the context of a judicial proceeding." *Id.* at 497, fn. 7. Indeed, in *Miller v. City of Philadelphia*, 174 F.3d 368, the Third Circuit distinguished *Ernst*, denying absolute immunity for conduct which occurred in the investigative phase of the custody proceedings. *Miller v. City of Philadelphia*, 174 F.3d at 376, fn. 6.

The only case other than *Babcock* which allows absolute immunity for social workers performing administrative or investigative functions is the one at issue here: the Sixth Circuit's opinion in *Rippy ex rel Rippy v. Hattaway*, 270 F.3d 416 (2001). The Sixth Circuit held that because the juvenile court makes the final decision whether to return a child to his or her parents' custody, *even*

the underlying investigation leading to the social worker's recommendation is protected by absolute immunity. Id. at 423. The court went one step further, however, holding that the Department of Children's Services "functions as an arm of the Juvenile Court" when it determines the elements of the permanency plan for a child. *Id.* Inexplicably, the Sixth Circuit made no gesture toward distinguishing its decision in *Rippy* from its *en banc* decision one year earlier in *Holloway v. Brush*, 220 F.3d 767 (6th Cir. 2000), which holds that the preparation of a child's "case plan" is not protected by absolute immunity. *Id.* at 776.

II. The Decision Of The Court Of Appeals Is Erroneous

This Court has carefully limited absolute immunity in the civil rights context to only those functions which are "so sensitive as to require a total shield from liability," *Harlow v. Fitzgerald*, 457 U.S. 800, 812-13, 102 S.Ct. 2727, 2735, 73 L.Ed.2d 396 (1982), and only if such shield is "essential" for the proper performance of that function." *Butz v. Economou*, 438 U.S. 478, 507-07, 98 S.Ct. 2894, 2910-11, 57 L.Ed.2d 895 (1978). In *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct.984, 994-95, 47 L.Ed.2d 128 (1976), this Court found that a prosecutor enjoys absolute immunity for functions "intimately associated with the judicial process" including initiating and pursuing a criminal prosecution, but, notably, not for "administrative" or "investigative" actions. *Id.* at 430-31, 96 S.Ct. at 994-95. A police officer applying for a warrant, therefore, is not absolutely immune from suit under Section 1983 because that function is too far removed from the judicial phase of criminal proceedings. *Malley v. Briggs*, 475 U.S. 335, 340-41, 106 S.Ct. 1092, 1095-96, 89 L.Ed.2d 271 (1986). In *Malley*, the Court noted that its role "is to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice...." *Id.* 475 U.S. at 341,

106 S.Ct. at 1097.

Until the ruling in the *Rippy* case, the Sixth Circuit Court of Appeals had been developing immunity jurisprudence consistent with Supreme Court precedent. In *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984), the court held that social workers who participated in the prosecution of neglect and dependency petitions in the Michigan courts enjoyed absolute immunity from suit, as did a guardian ad litem who participated in the court proceedings leading to the removal of a child from his parents' home. *Id.* at 1457-58.

Five years later, in *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989), the Sixth Circuit held that social workers are absolutely immune from suit for filing a petition in juvenile court which results in the temporary emergency custody of a child. *Id.* at 378. That same year, in *Achterhof v. Selvaggio*, 886 F.2d 826 (6th Cir. 1989), the court determined that the functions of opening a child abuse case, investigating it, and placing a parent's name in a central registry of persons believed to be child abusers are not quasi-prosecutorial but rather are administrative or investigative and therefore are not protected by absolute immunity.

Finally, in 2000, only one year before the ruling in *Rippy*, the Sixth Circuit in an *en banc* ruling found that a social worker's actions in developing a child's case plan, "failing to notify the trial court that the Plaintiff had made contact and wished to assert her parental rights, telling Plaintiff that her rights had been severed when they had not yet been, and withholding information that would have enabled Plaintiff to raise her rights in court before her rights were severed" do not fall within the description of a social worker "acting in the capacity of *legal advocates*" for whom absolute immunity is available. *Holloway v. Brush*, 220 F.3d 767, 776 (6th Cir. 2000) (emphasis in original).

The Sixth Circuit decision in *Rippy* is so contrary to the jurisprudence developed in the wake of *Imbler, Butz, Harlow,* and their progeny in the lower courts that it can only be described as an anomaly. *Rippy* is wrongly decided, not only because it conflicts with Sixth Circuit precedence, but also because it is inconsistent with well-reasoned opinions from other circuits on the same issue.

III. A Decision By This Court Is Crucial To Determine the Protection of Civil Rights of All Children In Foster Care

Allowing the Sixth Circuit's decision in this case to stand endangers the civil rights of all children in foster care or subject to removal from their parents' custody. If Travis and his parents have no recourse under section 1983, then no child is protected under section 1983. Here, social workers detained a child from his parents for a period of eighteen (18) months, with *no* evidence of abuse, while another social services agency, pursuant to the defendant social workers' request for information, determined that it was safe for the child to return to his parents' custody.

Members of this Court have already criticized lower appellate courts for erroneously granting absolute immunity to social workers. Specifically, Justice Thomas, joined by Justice Scalia, in the dissenting opinion to the denial of certiorari in *Hoffman v. Harris*, 114 S.Ct. 1631 (1994) (Thomas, J., dissenting from denial of certiorari), stated as follows:

> [a]n official seeking ... immunity ... must at the outset show that a "counterpart to the privilege he asserts" was recognized at common law in 1871.... The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary

> historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under Section(s) 1983. This all assumes, of course, that "social workers" (at least as we now understand the term) even existed in 1871. If that assumption is false, the argument for granting absolute immunity becomes (at least) more difficult to maintain.

Id.

Justice Thomas went on to state that the Court "should address the important threshold question whether social workers are, under *any* circumstances, entitled to absolute immunity." 114 S.Ct. at 1633 (emphasis in original).

Without a ruling from this Court defining the contours of "investigative" and "administrative" functions, social workers in the Sixth Circuit will continue to operate without proper accountability. There is no reason for social workers to enjoy absolute immunity bestowed upon them by this decision of the Sixth Circuit, particularly where this circuit's reading of the limits of Section 1983 conflicts so profoundly with the readings of other circuits.

Moreover, following the Sixth Circuit decision in *Rippy* to its logical conclusion, any state actor whose actions are subject to routine review by a trial court would be absolutely immune from suit under Section 1983. Police officers who violate suspects' civil rights in executing invalid search warrants would have immunity because the fruits of the search may be suppressed by a judge. Police officers who coerce confessions out of suspects would be immune from suit under Section 1983 because those actions would be subject to judicial

review on a motion to suppress the confession. In short, any wrongful action by a state employee could be cloaked by judicial immunity by virtue of submitting that action for review by a trial judge. That is not, and cannot, be the law of the Sixth Circuit or of this nation.

CONCLUSION

For the reasons set forth hereinabove, the Rippy family urges this Court to grant its petition for writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TRAVIS RIPPY, by next friend, Aaron and Janet Rippy; AARON RIPPY; and JANET RIPPY,	)	
Plaintiffs-Appellees,	)	
vs.	)	**No. 99-6277**
GEORGE W. HATTAWAY, individually and in his official capacity as Commissioner, Tennessee Department of Children's Services; ANNE MARIE BRYANT, individually and in her official capacity as social counselor of the Tennessee Department of Children's Services; and SHIRLEY BARTLETT, individually and in her official capacity as field supervisor of the Tennessee Department of Children's Services,	)	
Defendants-Appellants		

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 98-00761--Aleta A. Trauger, District Judge.
Argued: December 5, 2000
Decided and Filed: November 2, 2001
Before: BOGGS and GILMAN, Circuit Judges; BECKWITH, District Judge. (*)

COUNSEL

ARGUED: Douglas Earl Dimond, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellants. Kathleen G. Morris, Nashville, Tennessee, for Appellees. **ON BRIEF:** Douglas Earl Dimond, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellants. Kathleen G. Morris, Nashville, Tennessee, for Appellees.

BECKWITH, D. J., delivered the opinion of the court. GILMAN, J. (pp. 15-19), delivered a separate concurring opinion. BOGGS, J. (pp. 20-24), delivered a separate dissenting opinion.

OPINION

SANDRA S. BECKWITH, District Judge. On May 23, 1995, the Juvenile Court of Robertson County, Tennessee, issued an order placing Travis Rippy ("Travis") in the custody of the Tennessee Department of Children's Services (the "Department") pursuant to a petition filed by Appellant Anne Marie Bryant ("Bryant"). The Juvenile Court awarded custody of Travis to the Department on February 15, 1996 on the basis of a finding that he was a neglected and dependent child. Travis entered the actual custody of the Department on February 9, 1996 and remained in its custody until the Fourth Circuit Court for Davidson County, Tennessee, issued a writ of habeas corpus requiring the Department to return him to his parents, Aaron and Janet Rippy, on August 22, 1997.

The Rippys then filed a civil rights action, pursuant to 42 U.S.C. § 1983, in federal district court. They alleged that Bryant; Shirley Bartlett ("Bartlett"), Bryant's supervisor; and George Hattaway ("Hattaway"), the Commissioner of the Department, had violated the Rippys' right to due process under the United States Constitution.

They also asserted various claims under Tennessee law.

The Appellants moved the District Court for the dismissal of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted. They argued, inter alia, that they were shielded from liability with respect to the Rippys' § 1983 claims on the bases of absolute and qualified immunity. The District Court held that Appellants Bryant and Bartlett were absolutely immune with respect to claims based upon the filing of the petition that resulted in the order initially giving custody of Travis to the Department and for the execution of that order and any "flaws that may have been committed during the execution of that court order." It held that Bryant and Bartlett were not entitled to absolute or qualified immunity with respect to any administrative or investigational acts. The court did not address Appellant Hattaway's claims of immunity.

Appellants appeal the District Court's failure to dismiss the complaint on the bases of absolute and qualified immunity. For the reasons that follow, we **REVERSE** and **REMAND** for the entry of judgment in favor of the Appellants.

I

In considering a motion to dismiss pursuant to Rule 12(b)(6), a federal district court must accept all of the allegations in the complaint as true. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief if all the facts and allegations in the complaint are taken as true. See *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993)(citing *Nishiyama v. Dickson County*, 814 F.2d 277, 279 (6th Cir. 1987)). To survive a motion to dismiss under Rule 12(b)(6), "a . . . complaint must contain either direct or inferential allegations respecting all the material elements to

sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (citations and internal quotation marks omitted). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 811 (1993)(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). See also *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1189 (6th Cir. 1996).

When a defendant asserts qualified immunity in the face of a claim under §1983, the plaintiff bears an additional burden of pleading facts that, if taken as true, establish not only the violation of his rights, but also that these rights were so clearly established when the acts were committed that any official in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to refrain from the conduct. *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). *Veney v. Hogan*, 70 F.3d 917, 921 (6th Cir. 1995). This court reviews decisions on the legal sufficiency of the allegations in a complaint according to a de novo standard. See *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996).

II (1)

In her petition for temporary custody of Travis, Appellant Bryant erroneously alleged that Aaron and Janet Rippy had been indicted for the sexual abuse of their older son, Brandon. She further alleged that Aaron and Janet Rippy's parental rights to Brandon had been terminated and that the Rippys had refused to provide the Department with the address where Brandon could be found. Bryant had not observed Travis or conducted any investigation into his condition or risk of harm prior to filing the petition. She alleged that Travis was a neglected and dependent child.

On May 23, 1995, the Juvenile Court awarded temporary protective custody of Travis to the Department without conducting a hearing. The court conducted a hearing on May 25, 1995 in the absence of Aaron and Janet Rippy. The Juvenile Court did not immediately issue an order following that hearing, and Travis remained in the actual custody of his parents until February 9, 1996, when the Department took custody of Travis. On February 15, 1996, without further hearing, the Juvenile Court issued an order of disposition awarding custody of Travis to the Department. The court found that Travis was a neglected and dependent child on the basis of Appellant Bryant's allegations in the initial petition alone.

Between May 1995 and February 1996, no one from the Department observed, interviewed, or examined Travis. Travis resided in Kentucky during that time. Appellants Bryant and Bartlett did not take action to ensure that Travis was represented by a guardian ad litem at the May 25, 1995 hearing or that Aaron and Janet Rippy were aware of the right to counsel afforded to them by Tennessee law.

When Travis entered the actual custody of the Department in February of 1996, he bore no signs of abuse or neglect. In May 1996, social workers documented the absence of any signs of sexual abuse. The Kentucky state agency charged with the protection of children in that state approved the Rippys' home as a safe placement for Travis, but Appellants Bryant and Bartlett refused to return Travis to his parents' custody until ordered to do so in response to Aaron and Janet Rippys' petition for writ of habeas corpus.

Bryant prepared plans of care for Travis pursuant to Tennessee law applicable to neglected and dependent children and unspecified procedures promulgated and enforced by Appellant Hattaway. Appellant Bartlett instructed her to do so. The plans of care included

attendance at classes for sexual perpetrators by Aaron and Janet Rippy, in spite of the absence of evidence that Travis had been sexually abused or that his parents had been indicted or convicted of sexual offenses. Participation in those classes would have required Aaron and Janet Rippy to admit to being sexual perpetrators. They refused to attend the classes, and Appellants Bryant and Bartlett refused to return Travis to his parents' custody.

Appellants argue that they are shielded from liability with respect to the Rippys' § 1983 claim by virtue of the doctrine of absolute or judicial immunity. The District Court concluded that Appellants Bryant and Bartlett are absolutely immune from liability for the filing of the custody petition and the execution of the order resulting from that petition. The Rippys do not challenge that conclusion. Appellant Hattaway further argues that he is shielded from liability with respect to the § 1983 claim by virtue of the doctrine of qualified immunity, inasmuch as the Rippys' allegations do not satisfy the pleading requirements identified in *Veney v. Hogan*, supra.

III

"[S]ocial workers who initiate judicial proceedings against those suspected of child abuse or neglect perform a prosecutorial duty, and so are entitled to absolute immunity." *Achterhof v. Selvaggio*, 886 F.2d 826, 830 (6th Cir. 1989)(citing *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989); *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984)). The District Court concluded that Appellants Bryant and Bartlett are entitled to absolute immunity with respect to the filing of the petition for custody of Travis and the execution of the resulting order. The District Court did not specify which of the alleged acts of the Appellants were encompassed within that conclusion.

The investigation of a social worker that precedes the filing of

a complaint or petition is not necessarily a judicial act covered by absolute immunity. See *Achterhof*, 886 F.2d at 830. The Rippys do not allege that Appellants conducted any such investigation, however. Indeed, to the extent that their §1983 claim is based upon the actions of Appellants Bryant and Bartlett prior to the filing of the petition, it is the failure to investigate that is alleged.

The Rippys allege that Bryant filed the petition, which included erroneous accusations concerning conduct of Aaron and Janet Rippy. The implication is that Bryant failed to conduct a careful investigation before incorporating the false accusations in the petition. The District Court concluded, however, that Appellants Bryant and Bartlett are absolutely immune from liability arising from the filing of the petition. See *Achterhof*, 886 F.2d at 830. That immunity extends to unintentional errors in the petition. The Rippys do not allege that Appellant Bryant intentionally misrepresented that Aaron and Janet Rippy had been indicted for a sexual offense.

The District Court also concluded that Appellants Bryant and Bartlett are entitled to absolute immunity with respect to actions undertaken in the execution of the Juvenile Court's order awarding custody of Travis to the Department. That immunity is not defeated by a showing that the order was issued erroneously. See *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994). The Rippys do not challenge that ruling. The actions encompassed in the District Court's conclusion include the seizure of Travis when he was found at his parents' residence in Kentucky in February 1996. The District Court concluded that the Appellants' other actions were administrative or investigatory in nature and that Appellants are not entitled to absolute immunity with respect to those actions.

In order to determine whether the District Court identified all of the alleged acts of the Appellants with respect to which they are

entitled to absolute immunity, the Court must identify all of the actions that underlie the Rippys' §1983 claim. The Rippys allege that Appellant Hattaway promulgated and enforced procedures. They have not identified any specific procedure in their complaint, however. They allege only omissions to act on the part of Appellants Bryant and Bartlett. Specifically, they allege that Bryant and Bartlett failed to observe, interview, or examine Travis between May 1995 and February 1996; failed to ensure that a guardian ad litem was appointed to represent Travis at the May 1995 hearing; failed to inform Aaron and Janet Rippy that they were entitled to representation of counsel at that hearing; and failed to effect Travis' return to the custody of his parents between February 1996 and August 1997, in spite of the absence of evidence of a risk of harm.

The case law makes little distinction between prosecutors and social workers who initiate judicial proceedings related to the welfare of a child. See *Salyer*, 874 F.2d at 378. "Immunity rests not on status or title but on the function performed." *Id.* Prosecutors and, by analogy, social workers who initiate proceedings related to the welfare of a child are entitled to absolute immunity while functioning in roles intimately associated with the judicial phase of proceedings. See *Grant v. Hollenbach*, 870 F.2d 1135, 1139 (6th Cir. 1989).

The appointment of guardians ad litem and representation of counsel are matters intimately related to the judicial phase of child custody proceedings. The alleged failures of Appellants Bryant and Bartlett to ensure representation for Travis and to inform Aaron and Janet Rippy of their right to representation were, therefore, part of their quasi-judicial function and not distinct administrative or investigatory acts. For that reason, Appellants Bryant and Bartlett are entitled to absolute immunity for their alleged failures to ensure guardian ad litem representation for Travis and to inform Aaron and Janet Rippy of their right to counsel in the same manner that the

juvenile court judge would be entitled to absolute immunity for the same omissions. See *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000)(en banc).

The Rippys allege that Appellants Bryant and Bartlett violated Travis' right to due process and the Rippys' right to privacy by failing to observe, interview, or examine Travis between May 1995 and February 1996. They allege that Appellants Bryant and Bartlett violated the same rights by failing to effect Travis' return to his parents' custody between February 1996 and August 1997 in spite of the absence of evidence of a risk of harm. The implication of their allegations is that Appellants Bryant and Bartlett could have brought about Travis' return had they performed an adequate investigation at any time after the Juvenile Court ordered Travis' removal from his parents' custody in May 1995.

Tennessee law entrusts the decision whether to return a neglected child to the home from which he was removed to the Juvenile Court. See Tenn. Code Ann. §37-1-130(e)(1). The Department acts in an advisory role to the Juvenile Court in recommending that the child is ready to return home. See id. In performing that role, social workers in the Department act in much the same fashion as probation officers who make sentencing recommendations to criminal courts for which they are entitled to absolute immunity. See *Hili v. Sciarotta*, 140 F.3d 210, 213 (2d Cir. 1998); *Tripati v. INS*, 784 F.2d 345, 348 (10th Cir. 1986), cert. denied, 484 U.S. 1028 (1988); *Maynard v. Havenstrite*, 727 F.2d 439, 441 (5th Cir. 1984). The function of making such recommendations, including the underlying investigation, is similarly intimately related to the judicial phase of the child custody proceedings. Social workers involved in the investigation or recommendation are, therefore, entitled to absolute immunity with respect to claims arising from such recommendations and investigations. Appellants Bryant and Bartlett are immune from

liability for their alleged failure to investigate and effect Travis' return to his parents' custody after the Juvenile Court ordered his removal in May 1995. (2)

The Rippys also contend that Appellants Bryant and Bartlett's formulation of and attempt to implement a plan of care that required Aaron and Janet Rippy to admit to being sexual perpetrators is an administrative act and that Bryant and Bartlett are not entitled to absolute immunity with respect to those actions. Under Tennessee law, the Juvenile Court, and not the Department, is responsible for adopting a plan for permanent placement of a child, including a plan that places the child with his parents. See Tenn. Code Ann. §37-2-403(a)(2)(A). The Department "determine[s] the required elements or contents of the permanency plan." See id. Those elements include, in cases involving child abuse or neglect, appropriate rehabilitative assistance for the abusing or neglecting parent. See Tenn. Code Ann. §37-2-403(a)(5). Accordingly, under Tennessee law, the Department functions as an arm of the Juvenile Court for purposes of determining the required elements of the plan. The juvenile court adopts the plan devised by the Department.

As the party charged by Tennessee law with responsibility for devising the plan that is adopted by the Juvenile Court for the permanent placement of an abused or neglected child, the Department and its officials perform a quasi-judicial role in devising such a plan. The function of devising the plan for court-approval is intimately related to the judicial phase of the child custody proceedings. Social workers involved in devising the plan for permanent placement are, therefore, entitled to absolute immunity with respect to actions undertaken in devising the plan. That immunity protects Appellants Bryant and Bartlett from liability arising from the inclusion in the permanent placement plan for Travis of a requirement that Aaron and Janet Rippy attend classes for sexual perpetrators.

All of the alleged acts of Appellants Bryant and Bartlett are covered by absolute immunity. They are, therefore, entitled to the dismissal of the Rippys' claims against them on that basis. The only alleged act of any of the Appellants that is not covered by absolute immunity is Appellants Hattaway's promulgation and enforcement of policies. The promulgation and enforcement of policies is not related to the judicial phase of child custody proceedings. Appellant Hattaway is not, therefore, entitled to absolute immunity with respect to the Rippys' §1983 claim to the extent that it is based upon that alleged act.

IV

Government officials performing discretionary functions "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A constitutional right must be clearly established in a particularized sense. See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. The fact that a plaintiff has asserted the violation of a broadly stated general right is not determinative:[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must have been sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent. *Anderson*, 483 U.S. at 640. Qualified immunity protects "all but the plainly incompetent or those who knowingly

violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

When a qualified immunity challenge to the complaint is asserted, the plaintiff is entitled to the opportunity to come forward with additional facts or allegations that show not only the violation of his rights, but also that these rights were so clearly established when the acts were committed that any official in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to refrain from the conduct. *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). If this pleading burden is not carried by Plaintiff in either the original complaint or by a pleading in response to defendant's assertion of the qualified immunity defense, dismissal is proper. *Cameron v. Seitz*, 38 F.3d 264, 273 n.2 (6th Cir. 1994). *Veney*, 70 F.3d at 921. (3)

When a defendant asserts the qualified immunity defense in the context of a motion to dismiss, the plaintiff cannot rely upon mere "notice pleading." Rather, if the allegations in the complaint do not adequately set forth the circumstances in support of the plaintiff's claims, the plaintiff must amend her complaint to include specific and non-conclusory allegations of fact that will enable the court to determine whether those facts, if proven true, will overcome the qualified immunity defense. See id. at 922.

In their amended complaint, the Rippys make only one allegation of specific conduct by Appellant Hattaway in violation of rights guaranteed by the Constitution. They allege that he promulgated and enforced procedures pursuant to which Appellant Bryant removed Travis from his parents' custody, failed to inform Aaron and Janet Rippy of their right to counsel, and prepared a plan for Travis' permanent placement. While the promulgation and enforcement of procedures is a conceivable basis for a claim under § 1983, a plaintiff overcomes a qualified immunity defense only by identifying a

particularized, clearly established right that is violated by the promulgation and enforcement of specified procedures. See *Anderson*, 483 U.S. at 640.

The only specific procedure the Rippys identify in their amended complaint is that pursuant to which Appellant Bryant failed to inform Aaron and Janet Rippy of their right to counsel. Appellees cannot, however, establish that a right of parents to be informed by a governmental agency involved in child custody proceedings of their right to counsel was clearly established in May 1995. (4) Accordingly, their allegations are insufficient to overcome the qualified immunity defense asserted by Appellant Hattaway. He is, therefore, entitled to the dismissal of the Rippys' § 1983 claim against him.

V

For all of the reasons set forth above, the decision of the District Court denying, in part, the Appellants' motion to dismiss is **REVERSED**. This matter is **REMANDED** with instructions to enter judgment in favor of Appellants with respect to the Rippys' claim under § 1983.

CONCURRENCE

RONALD LEE GILMAN, Circuit Judge, concurring. I fully concur with the lead opinion's analysis regarding the absolute immunity of Bartlett and Bryant, and agree that Hattaway is entitled to qualified immunity. But because I believe that the Supreme Court's opinion in *Crawford-El v. Britton*, 523 U.S. 574 (1998), overrules the heightened pleading standard that this court created in *Veney v. Hogan*, 70 F.3d 917 (1995), I write separately to address footnote 3

of the lead opinion.

In *Veney*, this court imposed a heightened pleading standard upon plaintiffs suing a public official when the official asserts the defense of qualified immunity. *Veney*, 70 F.3d at 921. The lead opinion concludes that the Rippys did not satisfy this burden with respect to their claim against Hattaway. Although I agree that the Rippys have failed to state a claim against Hattaway, I do not believe that the pleading standard outlined in *Veney* is the correct rule to apply now that the Supreme Court has expressed its disagreement with court-fashioned pleading requirements not contained in the Federal Rules of Civil Procedure. See *Crawford-El*, 523 U.S. at 600-01 (expressing a preference for allowing district judges to have broad discretion over the management of the lawsuit, as permitted by the Federal Rules of Civil Procedure, rather than "categorical rule[s] imposed by the Court of Appeals.").

In *Crawford-El*, the Supreme Court rejected the D.C. Court of Appeals's rule requiring a plaintiff alleging unconstitutional motivation to prove such intent by clear and convincing evidence. The rationale used to strike down this heightened burden of proof calls into question all such court-fashioned rules. For example, the Supreme Court cautioned that the *sua sponte* creation of procedural rules, without precedential support or authorization by the Federal Rules of Civil Procedure or any other statutory grant of power, "would stray far from the traditional limits on judicial authority." *Id.* at 594. Although the Court describes its qualified immunity jurisprudence as an exception to this rule of restraint, it goes on to express its reluctance to allow qualified immunity itself to support a wide array of court-created procedural rules. The Court in fact pointed out that the defense of qualified immunity "did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation." *Id.* at 588. In reflecting on its history of restraint, the Court

stated that "[i]n the past, we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense. . . ." *Id.* at 595.

Crucial to the Court's discussion of judicial restraint in rulemaking was its belief that the Federal Rules of Civil Procedure currently provide a variety of tools that a district court can use to effectively weed out unmeritorious claims, but that do not also unduly restrict a district court from exercising its discretion given the peculiarities and uniqueness of each case. *Id.* at 598-601. For example, a district court "may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e)." Id. at 598. These and many other rules, rather than a blanket commandment such as that imposed by *Veney*, are more effective tools "to protect public officials from undue harassment." Id. at 600. The Court concluded its discussion by stating: It is the district judges rather than appellate judges like ourselves who have had the most experience in managing cases in which an official's intent is an element. Given the wide variety of civil rights and "constitutional tort" claims that trial judges confront, broad discretion in the management of the fact-finding process may be more useful and equitable to all the parties than the categorical rule imposed by the Court of Appeals. *Id.* at 600-01.

Although the lead opinion is technically correct that the factual underpinnings of *Crawford-El* involved "claims that require proof of wrongful motive," the Court's discussion and framing of the issue indicate that the role of appellate courts in rulemaking was generally at issue rather than simply the specific challenge to the D.C. Circuit's decision. This conclusion is supported by the Court's own formulation of the question presented in *Crawford-El*: The broad question

presented is whether the courts of appeals may craft special procedural rules for such cases to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties. The more specific question is whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment. *Id.* at 577-78; see also *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001) ("[T]he manner in which the Court framed the 'broad' question presented for appeal . . . suggests that the Court's ruling is not limited to the D.C. Circuit's heightened burden of proof.").

Because *Veney,* like the rejected rule in *Crawford-El,* was not derived from the Federal Rules of Civil Procedure, nor was its creation by this court permitted by any other grant of authority, I believe that *Crawford-El* invalidated this Sixth Circuit-created rule of heightened pleading. Although one panel of this court is generally prohibited from overruling the holding found in the published opinion of a prior panel, it may do so when an intervening decision of the Supreme Court invalidates the previous decision. See *Salmi v. Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."). I believe that *Crawford-El* has done just that - invalidating the rule created by *Veney.*

The Tenth Circuit, in *Currier,* recently set aside a similar rule of heightened pleading that was fashioned by a prior panel of that court, based on the conclusion that "[t]his court's heightened pleading requirement cannot survive *Crawford-El.*" *Currier*, 242 F.3d at 916. That court, like our own, acknowledged that "[a]lthough we are generally bound by the prior precedent of this court, there is an

exception to this rule when that precedent is superceded by contrary decisions of the Supreme Court." *Id.* at 912.

The First and Seventh Circuits have also addressed the impact of *Crawford-El* on court-created rules of heightened pleading. Although the First Circuit disagrees with my reading of *Crawford-El*, the Seventh Circuit is in agreement. See *Judge v. City of Lowell*, 160 F.3d 67, 74-75 (1st Cir. 1998) (holding that its heightened pleading requirement for discrimination cases survives *Crawford-El*); *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998) ("Civil rights complaints are not held to a higher standard than complaints in other civil litigation."); see also *Currier*, 242 F.3d at 915-16 (criticizing the analysis and conclusion of the Judge case). Accordingly, I would evaluate the Rippys' claim against Hattaway under the notice-pleading standard as outlined in Rule 8 of the Federal Rules of Civil Procedure rather than under the higher standard described by *Veney*.

The Rippys' complaint, however, even under Rule 8's less stringent pleading requirement, still fails to state a claim against Hattaway. We need not, for example, "accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Indeed, the Rippys' inclusion of Hattaway is at best cursory, and their assertions of unconstitutional acts on his part as Commissioner of the Tennessee Department of Children's Services are just that - legal conclusions lacking any factual support. This is insufficient even under a more liberal pleading standard. I therefore concur in the lead opinion's dismissal of the complaint against Hattaway.

DISSENT

BOGGS, Circuit Judge, dissenting. From the pleadings and from the decision of the Tennessee courts in the underlying habeas corpus case, we know that Travis Rippy was unlawfully detained by the Tennessee Department of Human Services, in violation of his and his parents' constitutional rights to due process. Under Tennessee law, an adjudicatory hearing should have been held within thirty days of the time that he was brought into the custody of the department. Instead, he was detained for more than eighteen months, and released only when his parents obtained a writ of habeas corpus. The question that remains is: Whose fault was this state of affairs, and what kind of immunity do any possible perpetrators have?

I agree with the majority that there is no basis for liability for any of the actions undertaken by the courts and the social workers, with one possible exception. I part company from the court on the question of whether there is a possible claim based on the actions of the social workers in detaining Travis for eighteen months without a hearing. It is the state's position, endorsed by the court's opinion, that the social workers either have no liability or have qualified or absolute immunity.

The plaintiffs' claims were dismissed on a Rule 12(b)(6) motion because the district court held that the state officials were either absolutely or qualifiedly immune under any conceivable set of facts arising from this complaint. I disagree, with regard to social workers Bryant and Bartlett. Based on the complaint, plaintiffs could conceivably prove that the social workers deliberately violated the parents' constitutional rights by preventing them from getting a hearing to try to recover the child who had been taken from them.

This detention of their child without a hearing was, as the Tennessee courts have already found, in violation of the parents' constitutional rights to due process.

Under these circumstances, I would permit the case to go forward, with at least enough discovery so that a court could ascertain whether genuine issues of material fact remain -- an inquiry that is appropriate at the summary judgment stage, but not at the stage of a dismissal under Rule 12(b)(6). I therefore respectfully dissent.

To defeat qualified immunity, a plaintiff must show that the defendant violated clearly established rights of which any reasonable official would be aware.

The facts might be sufficient to defeat qualified immunity, because a reasonable official would know that it violates constitutional rights to prevent for 18 months a hearing that should have happened in 30 days.

On this record, the Rippys might be able to prove that social workers Bryant and Bartlett knew that the parents had a right to an adjudicatory hearing. The Rippys might also be able to prove that Bryant and Bartlett actively (and successfully) sought to prevent such a hearing, by various dilatory and obfuscatory tactics. These may have included preparing draft plans of care that imposed on the parents onerous obligations that they would refuse, such as admitting falsely to being sex offenders. While the court is correct that actually filing in court such a draft plan would be protected by absolute immunity, the administrative action of using such drafts as a tactic to defeat the parents' right to a hearing would not be so protected. Willful failure to prepare a reasonable plan of care may be one of the things that prevented the parents from getting a hearing for over a year and a half.

This would meet the standard for violation of rights.

The central question is therefore whether there exists any set of facts that, if proven by the plaintiff, would state a claim against the defendants. The answer is indubitably yes.

I note, as example, that the United States District Court for the Eastern District of Pennsylvania has recently held that attorneys appointed by the State Department, as well as the federal employees who hired and directed them, do not necessarily have either qualified or absolute immunity when they interfere with a father's right to a hearing on custody of his child. *Egervary v. Young*, No. 96-3039, 2001 U.S. Dist. LEXIS 13726 (E.D. Pa. Sept. 6, 2001).

In *Egervary*, the defendants were federal employees in the State Department, and the attorneys appointed by the federal employees. *Id.* at *22. The attorneys, with support from the federal defendants, obtained an order from a federal district judge ordering the immediate removal of a child from his father in Pennsylvania and his return to Hungary without a hearing. *Id.* at *26. There was considerable evidence that the federal employees and the attorneys caused the judge in the case to fail to schedule a pre- or post-deprivation hearing. *Ibid.* Judge Thomas O'Neill found that these actions would, if proven, constitute a violation of a clearly established constitutional right, and that summary judgment in favor of defendants was inappropriate. *Id.* at *146.

In order to dispose of this case on a 12(b)(6) motion, an even higher standard must be met -- that plaintiffs can prove no set of facts that would support a claim. As *Egervary* shows, such a set of facts could be proven. If the defendant social workers did in fact intentionally interfere with and prevent a constitutionally required pre-deprivation hearing, they would be liable. Rule 12(b)(6)

disposition of this case is therefore inappropriate.

In this case, the department obtained physical custody of Travis Rippy on February 9, 1996. It is undisputed that, pursuant to Tennessee Rule of Juvenile Procedure 17, when a child has been taken away from his parents, there must be an adjudicatory hearing within thirty days of the date the child is taken into custody. The complaint specifically alleges (what is also reasonable to assume) that Bryant and Bartlett were aware of this rule and its mandatory nature. The complaint also alleges, which seems more subject to dispute, that the social workers "had the authority and ability to insist on the required adjudicatory hearing" and "failed to schedule the constitutionally required hearings." However, under Rule 12(b)(6) the issue is not what we believe as to the probable factual outcome. Instead, a motion to dismiss under Rule 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Based on the allegations in the complaint, it seems possible that the parents could prove that the social workers deliberately acted to prevent the holding of an adjudicatory hearing, despite well knowing that such a hearing was constitutionally required. Further, it is possible that plaintiffs could prove that the social workers deliberately attempted to create a plan of care that included false admissions of misconduct and that this was done "by holding . . . Travis hostage." (Amended Complaint, ¶ 19)

Our recent en banc holding in *Holloway v. Brush* clearly indicates that not every action taken by a social worker that has some connection to court proceedings is cloaked with absolute prosecutorial immunity. 220 F.3d 767 (6th Cir. 2000). At the 12(b)(6) stage, we must take it as possible that the ultimate facts will show that

the defendant social workers knew that the parents were constitutionally entitled to absolute or an adjudicatory hearing, and took steps to impede the holding of such a hearing. In my opinion, such actions would not be entitled to absolute or qualified immunity, under our holding in *Holloway*. *Id.* at 773-80.

As *Egervary* also shows, actions much closer to the courtroom door than those in our case have been denied qualified and absolute immunity. See *Egervary*, 2001 U.S. Dist. LEXIS 13726 at *146 (denying claim that representations by a federal agent in an ex parte hearing before a judge are protected by immunity).

Of course, it may well be that on summary judgment, or on full trial, such facts cannot be supported. But at the Rule 12(b)(6) stage, we are not free to make such a judgment, and I therefore respectfully dissent.

Footnotes

*The Honorable Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

[1] We accept the allegations in the amended complaint as true for purposes of this appeal.

[2] Relying, at least in part, on the recent decision in *Egevary v. Young*, No. 96-3039, 2001 U.S. Dist. LEXIS 13726 (E.D. Pa. Sept. 6, 2001), the dissent suggests that "the parents could prove that the social workers deliberately acted to prevent the holding of an adjudicatory hearing" and thereby overcome absolute immunity. The Rippys do not allege, however, that the social workers deliberately caused the Juvenile Court to fail to schedule a hearing or prevented the scheduling of a hearing, which the parents also had the "authority and ability" to request. The District Court's analysis, at the 12(b)(6) stage, is confined to the facts alleged. Having failed to allege that the social workers deliberately interfered with or prevented the scheduling of an adjudicatory hearing by the Juvenile Court, the

Rippys do not state a claim upon which relief could be granted in light of the absolute immunity afforded by law to the social workers.

[3] The Supreme Court's decision in *Crawford-El v. Britton*, 523 U.S. 574, 597-98 (1998), did not alter the requirements identified in *Veney v. Hogan*. The *Crawford-El* court limited its discussion of the qualified immunity defense to claims that require proof of wrongful motive. See *id.* at 597. The Court declined to heighten the pleading requirement on plaintiffs by changing the qualified immunity standard or otherwise with regard to such claims. See *Hoard v. Sizemore*, 198 F.3d 205, 218-19 (6th Cir. 1999).

[4] The right to representation by counsel in a proceeding affecting custody of one's child was a clearly established requirement of procedural due process in 1995. See *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983), *cert. denied*, 465 U.S. 1033 (1984). The right to be informed of the right to representation by a social worker, who performs a role like that of a prosecutor in that proceeding, was not clearly established at that time, however. The distinction is that Aaron and Janet Rippy do not allege that Appellant Bryant deprived them of their right to counsel, but that she failed to inform them of that right. A reasonable official in Appellant Bryant's position in May 1995 would not have clearly understood that she bore an affirmative duty to inform Aaron and Janet Rippy of their right to representation by counsel at the May 25, 1995 hearing. See *Dominique*, 831 F.2d at 676. Likewise, a reasonable official in Appellant Hattaway's position would not have clearly understood that he bore an affirmative duty to promulgate procedures pursuant to which officials of the Department would inform parents of their right to counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TRAVIS RIPPY, AARON RIPPY, and JANET RIPPY,	)
	)
Plaintiffs,	)
	)
v.	)**NO. 3:98-0761**
	)**JUDGE TRAUGER**
GEORGE HATTAWAY, ANNE MARIE BRYANT, and SHIRLEY BARTLETT,	)
	)
Defendants.	)

MEMORANDUM

I. Introduction

Pending before the court is the Defendant's Motion to Dismiss (Docket No. 28) and the Plaintiff's response (Docket No. 31) thereto. For the reasons stated herein, the Motion to Dismiss will be granted in part and denied in part.

II. Background

On May 22, 1995, Anne Marie Bryant, a social worker with the Tennessee Department of Children's Services (DCS), prepared

and filed a petition[1] in Robertson County Juvenile Court to have Travis Rippy, then one year and nine months old, removed from his parents' custody. The petition states in part:

... [T]he parents, Janet and Aaron Rippy have been indicted[2] of [sic] sexually abusing the child, Brandon Rippy, and on 5/18.95 had their parental rights to Brandon terminated by this court based upon the grounds that parents failed to seek treatment to address the sexual perpetrator issues, failed to obtain psychological evaluation and failed to pay child support. The mother, Janet Rippy, testified under oath at the termination procedure that the child[3] is being hidden from the Department and has refused to provide the Department with the address of the child. That this court has authority to compel the production of the child pursuant to T.C.A. 37-406.

•••

Petitioner would state that the above-named child(ren) (is) (are) subjected to an immediate threat to (his) (her) safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm in that the sibling of this child, Brandon Rippy,

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1 This is a form document with many blank spaces to be filled in and alternative wordings in brackets. Many blanks are not filled in and no alternative wordings have been crossed out, making it nonsensical in many respects. (*See* Am. Compl., Ex. A)

2 In fact, the parents had not been "indicted" for sexual abuse or any other crime related to their treatment of Brandon.

3 The plaintiffs interpret this reference to be Brandon, not Travis. (Am. Compl. at ¶ 8)

has been found by the Juvenile Court and the Circuit Court of Robertson County to be a victim of child sexual abuse. The abuse to Brandon occurred when he was a child around the age of 2-3. Based upon the past history of this family, the petitioner states the risk of abuse to this child is extremely high.

(Am. Compl., Ex. A)

The state took "legal" custody of Travis on May 23, 1995, when the Juvenile Court judge signed the petition (*see* TENN. CODE ANN. § 37-1-128(b)), and a hearing was held two days later. Aaron Rippy was served with process for the hearing,[4] but Janet Rippy was not. Neither parent attended the hearing and Travis was not represented by a guardian *ad litem*. (Am. Compl. at ¶ 12) The state did not take physical custody of Travis until February 9, 1996, when his whereabouts in Kentucky apparently were finally discovered. (Am. Compl. at ¶ 13) The Amended Complaint states that DCS removed Travis from his parents on February 9, 1996, when police "burst into the home" "in the middle of the night" and took Travis to a foster home. (Am. Compl. at ¶¶ 22-23)

The Juvenile Court entered an Order on February 15, 1996, stating that, based on "clear and convincing evidence," Travis was a neglected and dependent child and giving the state custody of him. (Am. Compl., Ex. C) In the Order, the Juvenile Court referred to the hearing held on May 25, 1995, at an "adjudicatory hearing."

During the next eighteen months, the Defendants Bryant and

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[4] The record does not reflect where he was served. The Amended Complaint alleges that the Rippys were living in Kentucky at the time of the petition. (Am. Compl. at ¶ 9)

Shirley Bartlett prepared and approved "Plans of Care" for Aaron and Janet Rippy to follow before Travis would be returned to them. This included a direction that the Rippys must attend classes for sexual perpetrators approved by the DCS.[5] Each of the programs, according to the plaintiffs, demanded that the participants admits to being sexual predators, which the Rippys said in their case would be untrue[6] and would expose them to potential criminal liability. (Am. Compl. at ¶ 19) The Kentucky Department of Social Services conducted a study of the Rippy home and determined that Travis should be returned to his parents. (Am. Compl. at ¶ 25)

Travis finally was returned to his parents after a two-day hearing in August 1997 in the Fourth Circuit Court for Davidson County, Tennessee, on a writ of habeas corpus filed by the Rippys. The court found that Travis' removal from his parents violated constitutional due process and that the Juvenile Court order placing Travis in DCS custody was therefore void. (Am. Compl., Ex. D)[7]

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The Rippys' refusal to "seek treatment to address the sexual perpetrator issues" had been one of the three grounds upon which their parents rights to Brandon had been terminated.

6

The Rippys allege that "[e]ven the psychosexual evaluations commissioned by the Defendants found no evidence that either of the parents were perpetrators of sexual abuse." (Am. Compl. at ¶ 25)

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The precise reasons for the court's ruling are not spelled out in the Order, and a transcript of this proceeding has not been filed in this court.

The Rippys allege the following causes of action: (1) violation of 42 U.S.C. § 1983 because the defendants violated the plaintiffs' due process rights; (2) intentional or negligent infliction of emotional distress by the defendants upon Travis; (3) intentional or negligent infliction of emotional distress upon Aaron and Janet Rippy; and (4) false imprisonment. The plaintiffs seek $1 million in compensatory damages, $1 million in punitive damages, reasonable attorney's fees and costs.

Defendants moved to dismiss the case on September 25, 1998. (Docket No. 7) The plaintiffs filed an Amended Complaint on October 30, 1998 (Docket No. 15), and the court denied the Motion to Dismiss as moot in light of the Amended Complaint. (Docket No. 23) The defendants now have moved to dismiss the Amended Complaint. (Docket No. 28)

III. Analysis

The defendants have moved for dismissal under Fed. R. Civ. P. 12(b)(6) on several grounds:

- ❑ the plaintiffs fail to state a claim against defendant Hattaway because he had no personal involvement in the action;
- ❑ the plaintiffs fail to state a claim for which relief may be granted against defendant Bryant because she merely mistakenly used the word "indict;"
- ❑ the plaintiffs lack standing;
- ❑ the defendants have absolute immunity;
- ❑ the defendants have qualified immunity;
- ❑ the Rippys never appealed state court orders and allowing the plaintiffs to attack those decisions in this forum would violate *res judicata*;
- ❑ the claims are barred by the statute of limitations;
- ❑ the court does not have subject matter jurisdiction to hear the

state law claims once the federal question claims are dismissed.

The court will analyze and rule on each of these defense assertions.

A. Legal standard

When considering whether to dismiss a case for failure to state a claim upon which relief may be granted, the court will deny the motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 335 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.... [A]ll the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Id. at 47. In this analysis the court must "construe the complaint liberally in the plaintiff's favor" and accept as true all of the plaintiff's factual assertions. *Lillard v. Shelby Co. Bd. of Ed.*, 76 F.3d 716, 724 (6th Cir. 1996).

B. Failure to state a claim against defendant Hattaway

The defendants contend that the case against defendant George Hattaway, Commissioner of the Tennessee Department of Children's Services, should be dismissed because the Amended Complaint alleges no direct involvement by Hattaway either in the decision to take Travis from his parents or in any way of the subsequent allegedly unconstitutional conduct. Such involvement is

required in order to prove a § 1983 claim, the defendants assert.

The statute providing the structure for civil actions against officials for deprivation of rights states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983. It is well established, therefore, that a "threshold inquiry" for a § 1983 claim is to identify the right protected by the Constitution or law that has been violated. *Lillard*, 76 F.3d at 724. The claim must state with clarity that the officials are named as individual plaintiffs, in a manner that "sufficiently alerts these officials that they may be personally accountable for any damages liability that may flow from plaintiffs' due process claim." *Wells v. Brown*, 891 F.2d 591, 593 (6th Cir. 1989).

Even when the claim is properly pleaded and the right and violation of that right have been identified, the claim cannot be extended to a supervisor under a *respondeat superior* theory. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). To prevail on a § 1983 claim against a supervisor, the plaintiff must show that the supervisor encouraged or participated in violating the plaintiff's rights or "at least implicitly authorized, approved or knowingly acquiesced" in the activity. *Id.* The Sixth Circuit has stated that a showing of direct responsibility for activity that violates the rights of others is required to impose individual liability upon supervisors. *Hays v. Jefferson Co.*, 668 F.2d 869, 873 (6th Cir. 1982). "What is required

is a causal connection between the misconduct complained of and the official sued." *Dunn v. Tennessee*, 697 F.2d 121, 128 (6th Cir. 1982).

The plaintiffs have properly stated in their Amended Complaint that Hattaway is being sued in his individual capacity and have identified their due process rights as the rights that may have been violated by him. Further, the plaintiffs argue that they are not attempting to extend the violation to Hattaway through *respondeat superior*, but instead assert the principle that officials may be held liable for creating procedures, policies and customs that violate the rights of others. Such procedures, the plaintiffs argue, would implicitly authorize the constitutional violation of the Rippys' rights.

The plaintiffs' argument that Hattaway should be held accountable for his employees' actions because he promulgated the policies or practices that led the state to take and maintain custody of Travis, is terminology that is generally applied when holding municipalities accountable for the actions of their employees. The Sixth Circuit has recognized that, although municipalities may not be held liable for the actions of their employees under a *respondeat superior* theory, "municipalities may be held liable for establishing and maintaining a custom, practice or policy that causes constitutional deprivations when that custom, practice or policy was established or maintained with recklessness or deliberate indifference to the consequences." *Sargi v. Kent City Bd. of Ed.*, 70 F.3d 907, 911 (6th Cir. 1995). Although the Sixth Circuit has not used this specific language to pierce the qualified immunity of a state employee in a supervisory role, it has repeatedly upheld the theory in connection with municipalities acting as employers. Other circuits have used this language to find individual liability for supervisors. "The personal involvement of a supervisory defendant may be shown by evidence that ... the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of

such a policy or custom...." *Colon v. Coughlin*, 58 F.3d 865, 873 (2nd Cir. 1995). "Only the direct acts or omissions of government officials, not the acts of subordinates, will give rise to individual liability under § 1983. The officials, however, may be liable when enforcement of a policy or practice results in a deprivation of federally protected rights." *Alton v. Texas A&M Univ.*, 168 F.3d 196, 200 (5th Cir. 1999) (internal citations omitted).

This theory, although not yet specifically sanctioned by the Sixth Circuit, fits within the framework of the test established by the Sixth Circuit. In *Taylor v. Michigan Dept. of Corrections*, 69 F.3d 76 (6th Cir. 1995), the court found that a supervisor at a correctional facility could be held liable for not adopting procedures to prevent an inmate rape. "A jury could find on the facts that [the defendant] had a job to do, and that he did not do it." *Id.* at 81. The Sixth Circuit also has favorably cited *Redman v. County of San Diego*, 942 F.2d 1435, 1446-1437 (9th Cir. 1991), for the proposition that, when a supervisor implements an unconstitutional policy, liability is direct, not vicarious. *Taylor*, 69 F.3d at 81. And finally, if a supervisor established the policy that directly caused the constitutional violation, that would amount to at least implicitly authorizing, approving or knowingly acquiescing in violation of the constitutional rights of the plaintiff, as required by the Sixth Circuit in *Bellamy*, 729 F.2d at 421, to show such a violation.

The Amended Complaint contains numerous allegations that Hattaway created the policies that directed Bryant to remove Travis from his home and to retain custody of the child for eighteen months. Because evidence of the promulgation and enforcement of policies that called for the removal and decision to retain custody of Travis may show that Hattaway bears direct responsibility for the actions of his staff in this instance, the plaintiffs have sufficiently stated a claim against Hattaway.

C. Failure to state a claim against Defendant Bryant based upon mistakes in the Petition

The defendants' argument that Bryant may not be held liable for her actions either because she is not a lawyer and did not understand the legal meaning of the word "indicted," or because she committed a "typo," is without merit. Bryant submitted a petition to the court upon which the court based its decision to remove a child from his parents. The defendants cannot argue on one hand that Bryant should be protected by absolute immunity as performing a "quasi-judicial" function, and that she is incompetent to perform such functions on the other. She is responsible for the representations she made to the court. Dismissal of the claim against her on this ground is not warranted.

D. The plaintiffs lack standing

The defendants argue that the plaintiffs lack standing because the Robertson County Juvenile Court committed the constitutional violations for which the Rippys seek damages and they have failed to include that court or judge as a defendant here. For this argument, the defendants rely upon *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), a case in which low-income individuals and organizations that represented them alleged that a revenue ruling issued by the Internal Revenue Service encouraged nonprofit hospitals to deny service to indigents. The only defendants wee the Secretary of the Treasury and the Commissioner of the IRS. In holding that the plaintiffs did not have standing because they had not established an "actual injury," the Supreme Court stated, "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the

court." *Simon*, 426 U.S. at 41-42. Because the hospitals that had denied service to the plaintiffs were not named as defendants, the plaintiffs had not met the case or controversy requirement and were held not to have standing. *See also*, *Coyne v. American Tobacco Co.*, 1999 WL 477012, *4 (6th Cir. 1999).

Here, certain of the plaintiffs' allegations of procedural error are entirely attributable to the Robertson County Juvenile Court, an entity not named as a defendant:

- ❑ failure to schedule a preliminary hearing and an adjudicatory hearing as required under TENN. CODE ANN. § 37-1-117;
- ❑ failure to advise the Rippys that they had a right to have an attorney present at the hearing; failure to serve Janet Rippy with process for the hearing that was held as required under TENN. CODE ANN. § 37-1-121;
- ❑ failure to appoint a guardian *ad litem* to represent Travis;
- ❑ failure to properly assert jurisdiction over Travis or his parents.

The defendants correctly point out that, under Tennessee law, these are all duties assigned to the court.[8] The petition specifically

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[8]

After the petition has been filed, the court shall fix a time for a hearing thereon. The court shall direct the issuance of a summons to the parents, guardian or other custodian, a guardian *ad litem* and any other persons to appear to the court to be proper or necessary to the proceeding....

TENN. CODE ANN. § 37-1-121(a) (emphasis added)

If a child alleged to be dependent and neglected is removed from the

required that a guardian *ad litem* be appointed for Travis, that the parents be served with a copy of the petition and that the court hold a preliminary hearing within three days. (Am. Compl., Ex. A at 3)

With regard to the assertion of jurisdiction over the Rippys, the petition was deficient in that it did not plainly set forth the facts that brought Travis within the jurisdiction of the court, as required by TENN. CODE ANN. § 37-1-120.[9] But, again, it is for the court to assure that it is acting with proper jurisdiction over the parties and not in reliance upon a petition arguably defective on its face as to the required jurisdictional allegations.

In asserting that the Robertson County Juvenile Court had no jurisdiction over them, the plaintiffs claim that they were living in Kentucky at this time. (Am. Compl. ¶ 9) However, according to the Petition, this very court had held a hearing to terminate the Rippys'

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custody of such child's parent, guardian or legal custodian prior to a hearing on the petition, a preliminary hearing shall be held no later than three (3) days after the child's removal, excluding Saturdays, Sundays and legal holidays, to determine whether such child's removal is required.... The court shall make every effort to advise the parent, guardian or legal custodian ... of the time, date and place of the hearing and the factual circumstances necessitating the removal.

TENN. CODE ANN. § 37-1-117(c) (emphasis added)

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"The petition shall be verified and may be on information and belief. It shall set forth plainly: (1) The facts which bring the child within the jurisdiction of the court.... (2) The name, age and residence address, if any, of the child on whose behalf the petition is brought...." TENN. CODE ANN. § 37-1-120.

parental rights as to Brandon only four days before the petition was filed, at which Mrs. Rippy had appeared and testified that she was hiding Brandon from DCS. By the time of the petition, the Rippys had apparently moved from their previous residence in Robertson County, as the petition shows their whereabouts as "Unknown." (Am. Compl., Ex. A) Under these facts, the Rippys may have come within the Juvenile Court's jurisdiction.[10]

The plaintiffs attribute these procedural errors to the defendants by asserting that they were represented by counsel before the Juvenile court and had a duty to bring any procedural deficiencies to the court's attention and see that they were rectified. But this argument is contrary to the law in this circuit. The Sixth Circuit has held that, to sustain a § 1983 claim for failure to act, the plaintiff must identify a specific basis for that duty. *Doe v. Claiborne Co.*, 103 F.3d 495, 512, 513 (6th Cir. 1996). In *Doe*, the court found that school board members who allegedly failed to take action against a teacher

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TENN. CODE ANN. § 36-6-203(a) provides:

A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if: (1) This state: (A) Is the home of the child at the time of commencement of the proceeding; or (B) Had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of the child's removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state....

accused of sexually abusing a student could not be held liable for duties for which they were not clearly legally responsible. "It may be freely conceded that the actions of these individuals left a lot to be desired. They may have been sloppy, reckless, or neglectful in the performance of their duties. But that is not enough for section 1983 liability...." *Claiborne Co.*, 103 F.3d at 513.

The defendants requested that the court appoint a guardian *ad litem* and serve the parents with a copy of the petition. The plaintiffs have not identified any basis – statutes, regulations, case law or even internal policies or traditional standards of care – upon which the defendants would be required to take any further action to insure that the required procedural steps were taken by the court. With no duty, there can be no § 1983 claim, and the plaintiffs may not assert standing on the basis of that claim. There are actions for which the defendants may be held liable, but these procedural defects for which the Juvenile Court was responsible are not among them.

However, the plaintiffs can show that the defendants had a statutory duty to investigate the risk of sexual abuse that Travis faced before attempting to remove him from his home.[11] They assert that the defendants did not do this at any point between May 22, 1995, when the initial petition was filed, and August 1997, when Travis was returned to his parents. They assert that the defendants put together a "Plan of Care" that did not address the family's problems and that the DCS refused to consider any alterations to that plan, even after the Kentucky Department of Social Services found that Travis could safely be returned to his home environment. These assertions satisfy the requirements for standing; the plaintiffs may maintain an action against the defendants for the direct harm that these actions may have

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[11] *See* Section F herein.

caused.

E. Defendants Bartlett and Bryant have absolute immunity

The defendants argue that Defendants Bartlett and Bryant are entitled to absolute immunity because when they initiated a petition in Juvenile Court, they were serving a "quasi-judicial" function, and when they removed Travis from his home, they were working pursuant to a court order that was not clearly invalid on its face.

The Sixth Circuit has "recognized that social workers who initiate judicial proceedings against those suspected of child abuse or neglect perform a prosecutorial duty, and so are entitled to absolute immunity." *Achterhof v. Selvaggio*, 886 F.2d 826, 830 (6th Cir. 1989). In *Salyer v. Patrick*, 874 F.2d 374 (6th Cir. 1989), the plaintiffs alleged that Kentucky social workers filed a Juvenile Court petition without adequately investigating a report that the child had been sexually abused. The court stated that "it appears to this court that the family service workers were absolutely immune from liability in filing the juvenile abuse petition, due to their quasi-prosecutorial function in the initiation of a child abuse proceedings." *Id.* at 378.

Therefore the court finds that the filing of the petition here clearly falls within the "quasi-judicial" category of activity under *Salyer*. The defendants are entitled to absolute immunity for their actions in presenting the petition to the court and cannot be held liable for any mistakes in their presentation. In addition, "enforcing or executing a court order is intrinsically associated with a judicial proceeding." *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994). The defendants are entitled to absolute immunity for their actions in executing the court order and any flaws that may have been committed during the execution of that court order.

E. Defendants Bartlett and Bryant have qualified immunity

The court's inquiry does not end there, however. The plaintiffs allege that the defendants' activities and duties when beyond presenting a petition to the Juvenile court and even beyond executing the court order. According to the plaintiffs, the defendants also abrogated their responsibility to investigate the risk of sexual abuse to Travis before they filed the petition, after the state took physical custody of Travis and during the nineteen months he was in foster care before being released pursuant to a writ of habeas corpus. During that time, these defendants also insisted on implementing a "Plan of Care" that the Rippys claimed was inappropriate to the needs of the family. These are investigative and administrative actions that must be analyzed under the qualified immunity doctrine.

Investigative functions are to be distinguished from prosecutorial functions. *Achterhof*, 886 F.2d at 829. To determine in which category actions fall, the Sixth Circuit has endorsed the "functional approach" that looks to the work performed, rather than the job title of the person performing it. *Holloway v. Ohio*, 1999 WL 350033, *7 (6th Cir. 1999). "For example, a prosecutor, who undertakes acts in the preparation or initiation of judicial proceedings is entitled to absolute immunity. On the other hand, when a prosecutor performs administrative acts unrelated to judicial proceedings, qualified immunity is all that is available." *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994).

The qualified immunity defense to § 1983 complaints were developed to ensure that public officials are shielded from liability for making decisions that may adversely affect others, while giving individuals a remedy for the actions of reckless or malicious officials. *Butz v. Economou*, 438 U.S. 478, 497, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). "The resolution of immunity questions inherently requires a

balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 813-814, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity can only be breached "if the official violated 'clearly established statutory or constitutional rights of which a reasonable person would have known." *Salyer v. Patrick*, 874 F.2d 374, 378 (6th Cir. 1989) (quoting *Harlow*, 457 U.S. at 818).

In this case, the defendants Bartlett and Bryant had the clear statutory duty to: (1) determine the nature and extent of any present or past injuries to Travis; (2) determine if they were caused by sexual abuse and, if so, determine who abused him; (3) determine where there was an immediate or long-term risk of leaving him in the home; (4) determine the actions needed to protect Travis; and (5) attempt to preserve and stabilize Travis' family life.[12] In addition, they were to

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It is the intent of the general assembly that the child protective investigations be conducted by the team members in a manner which not only protects the child but which also preserves any evidence for future criminal prosecutions. It is essential, therefore, that all phases of the child protective investigation be appropriately conducted and that further investigations, as appropriate, be properly conducted and coordinated.... The team shall .... (B) Determine whether there is any indication that any child in the family or household is sexually abused, including a determination of harm or threatened harm to each child; the nature and extent of present or prior injuries, or abuse, and any evidence thereof; and a determination as to the person or person apparently responsible for the abuse; (C) Determine the immediate and long-term risk to each child if the child remains in the existing home environment; and (D) Determine the protective, treatment and ameliorative services necessary to safeguard and ensure the child's

visit the home, observe the child in the home, interview the parents and other medical, psychological or psychiatric examinations of the child as part of their investigation.[13] These are investigative and administrative acts for which only qualified immunity is available.

The defendants try to derail this analysis by arguing that the plaintiffs cannot show that they violated a clearly established statutory or constitutional right of which a reasonable person would have known because "[T]here is no clearly established right of a parent that the petition for a child's removal be entirely free of errors." (Def. Mem. Supp. Mot. Dismiss at 13) The plaintiffs' allegations go far beyond mistakes in the petition. They allege that defendants Bartlett and Bryant violated the plaintiffs' clear constitutional right to retain custody of their child until and unless these defendants performed their statutorily mandated investigation

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well-being and development and, if possible, to preserve and stabilize family life.

TENN. CODE ANN. § 37-1-607.

[13]

The investigation shall include a visit to the child's home, an interview with and physical observation of the child, and an interview with the parent(s) of other custodian of the child and any other persons in the child's home. If the investigator deems it necessary, the investigation shall also include medical, psychological or psychiatric examinations of the child and/or any other children in the child's home or under the care of any person alleged to have permitted or caused abuse, neglect or sexual abuse of the child.

TENN. CODE ANN. § 37-1-406(e).

before using the court to deprive them of custody.

Two additional factors weigh against dismissal on the grounds of qualified immunity at this early stage – factors that make the plaintiffs' accusations more than "bare allegations."[14] First, one court has already determined after a lengthy hearing that Travis' removal from the family violated due process. Second, Kentucky's Social Services Department found, after an investigation, that the Rippy home was a fit home for Travis and recommended his return.

Accepting as true the assertions in the Amended Complaint, as this court must do for this motion, the court finds that defendants Bartlett and Bryant are not entitled to qualified immunity for the investigative and administrative acts alleged.

F. The plaintiffs' failure to appeal the plan of care forecloses this action

The Robertson County Juvenile Court reviewed and approved the plan of care as required by TENN. CODE ANN. § 37-2-403, and the defendants allege the Rippys should have appealed that order in state court. Because they did not appeal, the defendants argue, they should

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[14] Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow, 475 U.S. at 817-818.

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be barred by *res judicata* from using the plan as a basis for their claims. The defendants assert that, "Parents have the right to appeal all orders of the Juvenile Court, including those approving plans of care." (Def. Mem. Supp. Mot. Dismiss at 14) The only authority cited for this assertion is TENN. CODE ANN. § 37-1-159(a), which states in part:

> The juvenile court shall be a court of record .... and any appeal from any final order or judgment in an unruly child proceeding or dependent and neglect proceeding, filed under this chapter, may be made to the circuit court which shall hear the testimony of witnesses and try to case do novo.

TENN. CODE ANN. § 37-1-159(a) (emphasis added)

The statutory scheme set out in TENN. CODE ANN. § 37-2-403 provides for continual updating, reevaluating and modifying of the plan of care as long as the child is in foster care. It does not appear to be a "final order" which could have been appealed to a higher court. The defense brief cites no authority that holds otherwise, and the court has found none of its own. The plaintiffs' claims are not barred by *res judicata*.

G. Statute of limitations

The defendants assert that the Rippys' claims are time-barred because the court must follow the one-year statute of limitations for personal injury actions in Tennessee. Because the plaintiffs knew or should have known of the damage no later than February 9, 1996, when Travis was removed from his parents' home, the one-year statute of limitations would have expired on February 9, 1997, they argue.

No statute of limitations is specified for § 1983 actions, and it is correct that federal courts look to the personal injury statute of limitations in the forum state, which, in Tennessee, is one year. *Wright v. Tennessee*, 628 F.2d 949, 951 (6th Cir. 1980). But the plaintiffs assert that the constitutional violations were continuing violations that lasted up until Travis was returned to his parents on August 22, 1997.

The "continuing violation" doctrine is one that is recognized in this circuit.

> [T]his Court, although recognizing the general principle that the statute of limitations begins to run from the day of the injury, explained that 'when the injury-causing activity continues over time, unabated, that conduct is not legitimized by the passage of time.... [A]cquiescence to a continuing violation of constitutional rights does not extinguish the individual's rights.'

Chaudhuri v. Tennessee, 767 F.Supp. 860, 866 (M.D. Tenn. 1991); *see also, Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997).

This action was filed on August 20, 1998. The Amended Complaint can be construed as alleging a continuing violation that lasted until August 22, 1997. Therefore, the claims are not time-barred.

H. The court does not have subject matter jurisdiction

Because the court has found that federal questions remain in

the case, this court has subject matter jurisdiction over the remaining state claims.

An appropriate Order will enter.

ALETA A. TRAUGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TRAVIS RIPPY, AARON RIPPY, and JANET RIPPY,	)
	)
Plaintiffs,	)
	)
v.	)**NO. 3:98-0761**
	)**JUDGE TRAUGER**
GEORGE HATTAWAY, ANNE MARIE BRYANT, and SHIRLEY BARTLETT,	)
	)
Defendants.	)

ORDER

Pending before the court is the Defendant's Motion to Dismiss (Docket No. 28) and the Plaintiff's response (Docket No. 31) thereto. The motion is **GRANTED** in part and **DENIED** in part.

For the reasons stated in the accompanying memorandum, the claims against the defendants related to the submission of the petition and execution of the court order are **DISMISSED**. The claims against the defendants related to their failure to investigate and determine the risk of sexual abuse to Travis Rippy and to properly act based upon that risk shall go forward and the Motion to Dismiss those claims is **DENIED**.

Chief trial counsel shall appear for a case management conference in the chambers of Judge Trauger on Friday, August 27, 1999, at 3 p.m.

It is so **ORDERED** this 4th day of August, 1999.

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ALETA A. TRAUGER
United States District Judge

99-6277

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TRAVIS RIPPY, by next friend, Aaron and Janet Rippy; et al.	)	
Plaintiffs-Appellees,	)	
vs.	)	**ORDER**
GEORGE W. HATTAWAY, individually and in his official capacity as Commissioner, Tennessee Department of Children's Services; et al.	)	
Defendants-Appellants.	)	

BEFORE: BOGGS and GILMAN, Circuit Judges; and BECKWITH,[15] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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Hon. Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Entered January 8, 2002.